



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUN 12 2012

By Facsimile and first Class Mail
202.237.1200

Francis J. Martorana, Esq.
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4748 Wisconsin Avenue, N.W.
Washington, D.C. 20016

RE: MUR 6587
United Association Political
Education Committee
and William P. Hite, in his official
capacity as treasurer

Dear Mr. Martorana:

On October 12, 2011, the Federal Election Commission (the "Commission") notified the United Association Political Education Committee and William P. Hite, in his official capacity as treasurer (the "Committee"), your clients, of AR 11-06 indicating that, in the normal course of carrying out its supervisory responsibilities, the Commission became aware of information suggesting that the Committee may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). On June 5, 2012, the Commission opened MUR 6587 and found reason to believe that the Committee violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g), and 11 C.F.R. § 104.4(a), (b) and (c) provisions of the Act and the Commission's regulations. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that your clients have a legal obligation to preserve all documents, records and materials relating to this matter until notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519. In the meantime, this matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

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We look forward to your response.

On behalf of the Commission,

A handwritten signature in cursive script, appearing to read "Caroline C. Hunter".

Caroline C. Hunter
Chair

Enclosures
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: United Association Political Education Committee **MUR 6587**
and William P. Hite, in his official capacity as treasurer

I. INTRODUCTION

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. § 437g(a)(2). The Commission's Audit Division referred this matter to the Office of General Counsel following the Commission's approval of the Final Audit Report ("FAR") for the audit of the United Association Political Education Committee ("UAPEC") for the period from January 1, 2007 through December 31, 2008. See 2 U.S.C. § 438(b). The FAR, approved by the Commission on September 1, 2011, contained a finding (Finding 2) that UAPEC failed to timely file 24- or 48-Hour Notices and properly disclose independent expenditures.¹ On October 12, 2011, the Commission notified the Respondents of the referral of Finding 2 in accordance with the Commission's policy regarding notification in non-complaint generated matters. 74 Fed. Reg. 38617 (August 4, 2009). UAPEC did not respond.

The Commission found reason to believe that United Association Political Education Committee and William P. Hite, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g) and 11 C.F.R. § 104.4 (a) (b) and (c).

¹ The FAR is available on the Commission's website. See *Audit Report – United Association Political Education Committee-2008*, [http://www.fec.gov/audits/2008/United Association Political Education Committee/FinalAuditReportoftheCommission1186335.pdf](http://www.fec.gov/audits/2008/United%20Association%20Political%20Education%20Committee/FinalAuditReportoftheCommission1186335.pdf).

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

UAPEC is a separate segregated fund of the United Association of Journeymen and Apprentices for the Plumbing and Pipefitting Industry of the United States and Canada and has been filing reports with the Commission since September 1976. On September 18, 2008, UAPEC filed its 2008 September Monthly Report, which disclosed a \$56,289 disbursement for billboards and signs on Schedule B (Itemized Disbursements). On October 8, 2008, the Commission's Reports Analysis Division ("RAD") sent UAPEC a Request for Additional Information ("RFAI") asking UAPEC whether the \$56,289 disbursement was for materials that contained express advocacy that should have been reported as either in-kind contributions or independent expenditures. In response, on January 8, 2009, UAPEC filed an amended 2008 September Monthly Report, disclosing the disbursement as an independent expenditure "in support of Barack Obama" on Schedule E (Itemized Independent Expenditures). From September 2, through December 3, 2008, UAPEC made seven additional disbursements for mini-billboards, yard signs, posters, shirts, and hats "in support of Barack Obama for the 2008 General Election." As detailed in the table below, each of these disbursements was itemized as an independent expenditure on Schedule E of the respective report covering the date on which the invoice for the activity was paid. UAPEC did not file any corresponding 24- or 48-hour notices for these expenditures.

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TABLE OF ITEMIZED INDEPENDENT EXPENDITURES

Disbursement	Amount	Invoice Date	Date Paid ²	Report	Date Filed
Billboards, Signs, etc.	\$56,289.28	8/20/08	8/27/08	2008 Sept. Monthly (Schedule B); Amended 1/8/09 (Schedule E)	9/18/08
Mini-Billboards, Yard Signs	\$26,735.54	8/28/08	9/2/08	2008 Oct. Monthly (Schedule E)	10/20/08
Mini-Billboard, Signs	\$50,279.25	9/25/08	10/1/08	2008 12-Day Pre-General (Schedule E)	10/23/08
Lapel Pins	\$7,229.00	9/30/08	10/10/08	2008 12-Day Pre-General (Schedule E)	10/23/08
Billboards, Signs	\$31,704.75	10/6/08	10/27/08	2008 30-Day Post-General (Schedule E)	12/2/08
Signs	\$12,710.18	10/23/08	11/7/08 (11/3/08 on Sch. E)	2008 30-Day Post-General (Schedule E)	12/2/08
Signs	\$1,157.43	11/7/08	11/12/08	2008 30-Day Post-General (Schedule E)	12/2/08
Printing	\$324,208.99	10/31/08 and 11/18/08	12/3/08 (12/10/08 on Sch. E)	2008 Year-End (Schedule E)	1/26/09
TOTAL	\$510,314.42				

The Commission sent Requests For Additional Information ("RFAs") to UAPEC for the amended 2008 September Monthly Report and subsequent reports indicating that UAPEC may have failed to file one or more of the required 24- or 48-hour notices for independent expenditures. The RFAs noted that such expenditures must also be fully itemized on Schedule E, or as memo entries on Schedule E and reflected on Schedule D (Debts and Obligations) of the next report required to be filed by the committee, if distributed or disseminated prior to the payment. On March 5, 2009, UAPEC filed a single 48-hour notice for the \$510,314.42 in independent expenditures previously disclosed on the Schedules E.

² The invoice date and date paid were obtained by Audit Staff from vendor invoices. The date paid is the same date as was reported on the Schedules E, except in the two instances noted above (see chart).

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Pursuant to 2 U.S.C. § 438(b), the Commission subsequently authorized an audit of UAPEC's activity for the period from January 1, 2007 through December 31, 2008. The Interim Audit Report ("IAR") concluded, *inter alia*, that UAPEC did not properly report its independent expenditures in two respects. First, the IAR concluded that UAPEC improperly disclosed independent expenditures based on the date paid rather than the date disseminated.³ Second, UAPEC failed to file corresponding 24- or 48-hour notices for any of these expenditures. Although UAPEC failed to keep records showing dissemination dates, based on the October and November dates on most of the invoices, the auditors concluded that the materials were likely disseminated within a timeframe that required 24- or 48-hour notices. *Id.*

The Audit staff recommended that UAPEC implement revised procedures to properly disclose independent expenditures on Schedule E and/or D and to track aggregation and dissemination for both the 24- and 48-hour notice requirements. *Id.* at 7. At the audit exit conference, representatives for UAPEC stated that they understood the 24- and 48-hour independent expenditure notice requirements, but was unsure how to determine a dissemination date because the nature of the expenditures at issue -- yard signs, mini billboards, shirts, and hats made it difficult to ascertain precisely when the materials were publicly disseminated. IAR at 6. They explained that these materials are not typically disseminated on the date the material is received at the national union headquarters, but are generally sent directly to local union members or to local unions for further distribution. *Id.* UAPEC represented that, going forward, it would deem the date the material is received at its headquarters as the dissemination date for reporting purposes. *Id.* In its subsequent written response to the IAR, UAPEC indicated that it

³ For independent expenditures that were disseminated before they were paid for, UAPEC should have disclosed them as memo entries on Schedule E, and as a corresponding debt on Schedule D.

developed new independent expenditure tracking procedures and provided a copy. *See* UAPEC Response to the IAR at 4 and Exhibit 3.

The Draft Final Audit Report ("DFAR") also concluded that UAPEC did not properly report its independent expenditures but noted that UAPEC had provided a copy of its new procedures for reporting independent expenditures. In response to the DFAR, UAPEC reiterated the arguments it made at the audit exit conference. *See* UAPEC Response to the DFAR at 2. UAPEC also asserted that it did not believe either the Act or Regulations provided guidance on when such materials should be considered disseminated. *Id.* Finally, UAPEC argued that because it is impossible to determine a dissemination date for these types of materials, the Commission should take no further action with respect to this Finding and Recommendation. *Id.* at 3.

On September 1, 2011, "the Commission approved a finding that UAPEC was required to file 24- or 48-hour notices for independent expenditures based on the dissemination date rather than payment date, and that UAPEC failed to keep a record of the dissemination date for the materials that were the result of the independent expenditures." The FAR indicated that UAPEC may consider the date such materials are delivered to its headquarters as the dissemination date for the purpose of filing 24 or 48-hour notices.⁴ FAR at 7.

On October 12, 2011, this Office notified the Respondents of the referral of Finding 2 of the FAR to OGC for possible enforcement action in accordance with the Commission's policy

⁴ The Commission also indicated that it intended to provide guidance on when certain independent expenditures are publicly disseminated for the purposes of the reporting requirements for independent expenditures. And on October 4, 2011, the Commission issued an Interpretive Rule addressing when independent expenditure communications taking the form of mini-billboards, yard signs, handbills, hats, buttons and similar items are considered "publicly disseminated" for reporting purposes. *See Interpretive Rule on When Certain Independent Expenditures Are "Publicly Disseminated" for Reporting Purposes*, 76 Fed. Reg. 61254 (Oct. 4, 2011).

regarding notification in non-complaint generated matters. *See* 74 Fed. Reg. 38617 (August 4, 2009). UAPEC did not respond.

B. Legal Analysis

An independent expenditure is an expenditure that expressly advocates the election or defeat of a clearly identified Federal candidate and is not made in concert or cooperation with, or at the request or suggestion of, the candidate or his or her committee or agent. 2 U.S.C. § 431(17). Under the Commission's regulations at 11 C.F.R. § 100.22(a), express advocacy includes phrases such as "vote for the President" or "defeat" accompanied by a picture of one or more candidates. It also includes material that contains campaign slogans or individual words, "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." *Id.*

Every political committee that makes independent expenditures must report those expenditures in its regularly scheduled disclosure reports in accordance with 11 C.F.R. § 104.3(b)(3)(vii) and 11 C.F.R. § 104.4(a). Specifically, a political committee must disclose on Schedule E the name of a person who receives any disbursement during the reporting period in an aggregate amount or value in excess of \$200 within the calendar year in connection with an independent expenditure by the reporting committee. The report must disclose the date, amount, and purpose of any such independent expenditure and include a statement that indicates whether such independent expenditure is in support of or in opposition to a candidate, as well as the name and office sought by such candidate. 2 U.S.C. § 434(b)(6)(B)(iii); 11 C.F.R. §§ 104.3(b)(3)(vii) and 104.4(a). Independent expenditures of \$200 or less do not need to be itemized, though the committee must report the total of those expenditures on line (b) of Schedule E. *Id.* Further, a debt or obligation over \$500 shall be reported as of the date on which the debt or obligation is

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incurred. 11 C.F.R. § 104.11(b). Independent expenditures made (*i.e.*, publicly disseminated) prior to payment should be disclosed as memo entries on Schedule E and as reportable debt on Schedule D. Committees are required to maintain records that provide information with sufficient detail so that the reports may be verified. 11 C.F.R. § 104.14(b)(1).

Under certain circumstances, independent expenditures made by a political committee require disclosure in addition to the committee's regularly scheduled disclosure reports. A political committee that makes or contracts to make independent expenditures aggregating \$10,000 or more in connection with a given election at any time during a calendar year up to and including the 20th day before the date of an election is required to file a report describing the expenditures within 48 hours. 2 U.S.C. § 434(g)(2); 11 C.F.R. § 104.4(b)(2). These reports, known as 48-hour notices, must be filed by the end of the second day "following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(b)(2). A committee is required to file additional reports within 48 hours after each time it makes or contracts to make independent expenditures aggregating an additional \$10,000. *Id.*

Further, a political committee that makes or contracts to make independent expenditures aggregating \$1,000 or more in connection with a given election after the 20th day but more than 24 hours before the date of an election is required to file a report describing the expenditures within 24 hours. 2 U.S.C. § 434(g)(1); 11 C.F.R. § 104.4(c). These reports, known as 24-hour notices, must be filed within 24 hours "following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(c). The committee must file additional reports within 24

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hours after each time it makes or contracts to make independent expenditures aggregating an additional \$1,000. *Id.*

UAPEC failed to file one or more 24- or 48-hour independent expenditure notices for \$510,314 in independent expenditures it disclosed in its regularly filed disclosure reports. It appears that the materials at issue contained express advocacy and thus were required to be disclosed as independent expenditures. UAPEC began disclosing these disbursements as independent expenditures on Schedule E after receiving an RFAI indicating that if these materials contained express advocacy, they were to be disclosed as independent expenditures on Schedule E. UAPEC described these materials on its Schedule Es as billboards, yard signs, lapel pins, signs, and printing "in support of Barack Obama for the 2008 General Election," and documentation reviewed by the auditors includes vendor invoices for these materials in support of Obama or Obama/Biden. *See, e.g.,* note 2. Further, although UAPEC did not maintain records or keep track of its dissemination dates, the nature of the materials and the invoice dates indicate that these materials were likely disseminated shortly before the election. And UAPEC does not dispute that the materials were disseminated shortly before the election. Therefore, even if the precise dissemination dates cannot be determined for purposes of determining if a 24-hour notice was required, UAPEC would have been required to file 48-hour notices for any independent expenditures aggregating \$10,000 or more in calendar year 2008 up to and including the 20th day before the election.

UAPEC also failed to properly disclose its independent expenditures on its Schedule Es, in two respects: first, by reporting the expenditures on the date paid rather than on the dates the materials were publicly disseminated; and second, with regard to those materials that were

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disseminated before they were paid, by failing to disclose the expenditures as memo entries on Schedule E and as a corresponding debt on Schedule D.

Accordingly, there is reason to believe that United Association Political Education Committee and William P. Hite, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g), and 11 C.F.R. § 104.4(a), (b) and (c) by failing to timely file 24- and 48-hour notices and properly disclose independent expenditures.

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